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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 782

JULIUS GOLDMAN, ET AL., *Petitioners*

v.

H. HARRIS & CO., INC., ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR ALL RESPONDENTS IN OPPOSITION

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Opinions Below

The District Court rendered no opinion on final judgment, but the Findings of Fact [1] and Conclusions of Law [2] (Pet. 5a-18a),[3] which it handed down in connection with granting defendants' motion to dismiss at the close of

[1] Hereinafter abbreviated as "F/F".
[2] Hereinafter abbreviated as "C/L".
[3] "Pet." references are to the petition for certiorari.

plaintiffs' case, are reported at 160 F. Supp. 95. The opinion of the Court of Appeals (Pet. 19a) affirming, *per curiam*, the judgment of the District Court is reported at 260 F.2d 958.

Questions Presented

1. Whether the wholesale fruit and vegetable auction market operated in Boston by defendant-respondents in direct competition with two other Boston wholesale fruit and vegetable markets is itself a relevant market for purposes of Section 1 and 2 of the Sherman Act.[4]

2. Whether the defendant-respondents unreasonably restrained, monopolized, or attempted to monopolize, the marketing and sale of citrus and deciduous fruits in the New England area by making a five-cent charge to the plaintiffs and others similarly situated.[5]

3. Whether, even if there had been any restraint or monopolization, the plaintiff-petitioners made a showing of injury in their business or property sufficient to sustain an action under Section 4 of the Clayton Act.[6]

Argument

REASONS WHY THE WRIT SHOULD BE DENIED.

1. *None of the Criteria of Supreme Court Rule 19 Has Been Met.*

Although the petition contains no clear or coordinated statement of the reasons why it is believed that the writ

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[4] 15 U.S.C. Secs. 1-2, 26 Stat. 209, as amended.

[5] This is the nub of the offense charged in plaintiffs' complaint. See Record Appendix in Court of Appeals (hereinafter referred to as "R."), at pp. 14-15.

[6] 15 U.S.C. Sec. 15, 38 Stat. 731.

should be granted, petitioners apparently claim that there is a conflict of court of appeals decisions (Pet. 20) [7] and that the judgment of the District Court conflicts with decisions of this Court (Pet. 12, 20, 21, 26 and 29).

The alleged conflict between courts of appeals decisions is said to involve the rule that a corporation cannot conspire with its own officers if they are acting solely within the scope of their employment.[8] The petitioners claim that *Patterson* v. *United States*, 222 Fed. 599, and *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F.2d 600, state an opposing view. This is incorrect. In the *Patterson* case this question was not considered; and in the *White Bear* case the charge was an attempt to monopolize under § 2 of the Sherman Act, no question of conspiracy under § 1 having been involved.

We will deal below with the claims of the petition that the judgment of the District Court is in conflict with decisions of this Court on the issue of "relevant market" under § 2 of the Sherman Act [9] and on the question of the showing which a plaintiff must make in order to maintain suit under § 4 of the Clayton Act.[10] Suffice it to say at this juncture merely that the cases on damages cited by the petitioners at page 26 are not in conflict with the principle of law underlying Conclusion of Law 5, as supported by Findings of Fact 35-39 and 44-45. Moreover, *Story Parchment Company* v. *Paterson Co.* and *Bigelow* v. *RKO Pic-*

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[7] The petition also claims that there is a conflict between the opinion of the District Court in this case and the First Circuit's decision in *Gamco, Inc.* v. *Providence Fruit and Produce Building, Inc.*, 194 F.2d 484, cert. den. 344 U.S. 817 (1952). The First Circuit itself was apparently unimpressed by this argument, as is evidenced by its *per curiam* one-paragraph affirmance of the District Court's decision here.

[8] See pp. 8-9, *infra*.

[9] See pp. 4-8, *infra*.

[10] See pp. 10-12, *infra*.

tures Inc., cited in the petition on page 29, are not relevant in context.[11]

Accordingly, it appears that the petitioners fail to state a proper case under Rule 19 of this Court.

2. *The Issues Raised by the Petition Are Academic.*

A further reason for denying the writ is that if the points raised by the petition are considered in the light of the whole case they are seen to be peripheral only and of no practical importance to the parties or the public at large.

The petition does not address itself to the central questions of whether any unreasonable restraints have been imposed on trade or commerce or whether the defendant-respondents have monopolized or attempted to monopolize.[12] Yet until these fundamental questions are answered in the affirmative,[13] the three points argued by the petitioners are of academic interest only.[14]

B. The Relevant Market Is To Be Defined No More Narrowly Than the Business of Providing a Market Place for the Purchase and Sale of Fresh Fruit at Wholesale in Less than Carload Lots in the Greater Boston Area.

Purporting to rely on *United States* v. *du Pont & Co.*, 351 U.S. 377 (1956) (the *du Pont Cellophane* case), peti-

[11] The issue in those cases was not whether the plaintiffs had been injured, but rather whether the extent of the injury was so difficult to ascertain that damages could not be awarded.

[12] Evidently the petitioners expect the Court simply to *assume* that antitrust law violations have occurred. This is consistent with the approach of plaintiff-petitioners throughout this litigation in that they have never squarely faced the issue of how and why maintenance of the five-cent charge should be held to violate the Sherman Act.

[13] That these questions have already been answered in the negative on the basis of factual findings of consequence only in this particular litigation is entirely apparent from the findings and conclusions of the District Court and from the *per curiam* opinion of the Court of Appeals.

[14] They are also without merit. We therefore undertake to answer them briefly and *seriatim*.

tioners claim (Pet. 12-18) that the District Court's Conclusion of Law 3 erred in defining the relevant anti-trust market too inclusively. The "part of trade or commerce" to which we must look in determining whether the defendant-respondents have monopolized, say the petitioners, must be limited to the confines of Harris' own business. *Ergo*, the defendant-respondents have monopolized.

But the *du Pont Cellophane* case, far from authorizing the kind of shooting-fish-in-a-barrel approach which the petitioners desire, makes it clear that a much broader view of the market is required. As the Court stated:

> "Every manufacturer is the sole producer of the particular commodity it makes, but its control . . . of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand . . . This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." 351 U.S. 377, 380-381.

The Court also made it clear in *du Pont Cellophane* (at p. 395) that "the varying circumstances of each [relevant market] case determine the result."

Although the petitioners expressly state that they do not challenge the District Court's Findings of Fact (Pet. 11),[15] the claim of their Point I that the auction market

[15] In view of the Court of Appeals' holding that it was "entirely satisfied that the findings of fact by the District Court were amply supported by the evidence", and in the light of the requirement of F.R.C.P. Rule 52 that findings of fact of the trial court must stand unless "clearly erroneous", petitioners would obviously have found it extremely difficult to make any such challenge. But despite their expression of acquiescence in the Findings of Fact, petitioners neverthe-

operated by the respondents is itself the relevant antitrust market (Pet. 12-19), runs afoul of Findings of Fact 9, 10, 12-19 and 40-43. In summary, these findings establish that:

1. Defendant-respondent H. Harris & Co., Inc. ("Harris") is in direct competition with Boston Market Terminal ("BMT") and Faneuil Hall Market ("Faneuil") in the business of maintaining facilities and furnishing services [16] in connection with the sale in Boston of fresh fruit and vegetable produce at wholesale in less-than-carload lots. (F/F 9, 14-15, 41).

2. The plaintiffs are fresh fruit and vegetable jobbers,[17] all of whom purchase at wholesale in less-than-carload lots both at BMT and at Harris. Most of them also buy at other local markets including, in many cases, Faneuil (F/F 10 and 40).

3. Although the lists of varieties and brands of fruit and vegetable produce available for purchase at any given time at the various markets are not co-extensive, they are substantially alike, and considerations of comparative price constitute the primary factor in determining which of these markets the buyers patronize to satisfy their current requirements (F/F 10, 14-16, 40).

4. The prices at which fresh fruits and vegetables are sold at the three principal markets (BMT, Harris and Faneuil) are mainly determined by the laws of supply and demand (F/F 14 and 40).

5. Harris' control over the charges it makes to its cus-

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less devote considerable discussion to certain evidence at the trial, as if to suggest that there is something wrong with the Findings, and as though the District Court had been required to believe the testimony of plaintiffs' witnesses. (See, e.g., Pet. 16-18, 21-22).

[16] "Harris does not own any produce nor does it act for any person in the purchase or sale of produce, except that it acts for the sellers in collecting for them the proceeds of sales." (F/F 9).

[17] For the purpose of this action they describe themselves as "buyers". They sell primarily to retail stores, but also to hotels, restaurants and others. (F/F 10).

tomers for its own services and facilities is severely limited by a cross-elasticity of demand (on the part of both buyers and sellers) for the services and facilities available at the three principal markets. (F/F 42).

6. "Sunkist" brand citrus products are in direct competition in the less-than-carload-lot wholesale market in Boston with other brands of citrus products. (F/F 43).

Thus the District Court's Findings of Fact, read in connection with the *du Pont Cellophane* case and other applicable authority,[18] effectively demolish the claim that the defendant-respondents have possessed or exercised monopoly power—whether that power is alleged to be (a) over the supply and prices of wholesale fresh citrus and deciduous fruit in the New England area, as originally charged,[19] or (b) over the fresh fruit and vegetable *auction marketing facilities and services* in the area, as now claimed.

The petition appears to take the position that the illegal monopoly power allegedly possessed by Harris derives from its supposed monopoly-in-fact in the business of offering auction marketing facilities and services to wholesale buyers and sellers of fresh fruit and vegetable produce, as augmented by its alleged control over the supposedly vital supply of Sunkist products. This is an unsound position both on the facts and on the law. Harris has no monopoly-in-fact on the auction method of marketing fresh fruit and vegetable products at wholesale since, as the evidence showed, a firm called Sweeney, Lynes also uses the auction method (R. 255). For that matter, there

[18] See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cert. den. 355 U.S. 822 (1957); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd. 259 F.2d 524 (2d Cir. 1958). And cf. *United States* v. *du Pont & Co.*, [illegible] (1957); *International Boxing Club of New York, Inc.* v. *United States*, 79 S. Ct. 245 (1959).

[19] R. 14-15. See footnote 5, *supra*.

was not a shred of evidence that the other wholesale markets, such as BMT, could not adopt the auction method at will. Furthermore, it is clear that Harris has had no commitment from Sunkist that the latter would sell all or any part of its Boston shipments through Harris (R. 329-331). And the contract between the parties (Ex. 5)—which in any case is terminable at will by either party on thirty days' notice to the other—does not preclude Harris in any measure from handling the sale of any competing citrus product.

Even if Harris were to have an exclusive right to sell all of Sunkist's citrus products in the Boston wholesale market, this would still not constitute monopolization under the cases, in view of the directness of the competition in which Sunkist products are engaged with other brands of citrus products (F/F 43). It is undisputed that it is impossible for anyone to differentiate Sunkist oranges from any other brand of oranges if the label is removed (R. 145), and the petitioners' own witnesses testified that whether they purchased Sunkist or non-Sunkist products depends upon what the relative prices are at any given time. (See, e.g., R. 258-259). Thus, in the words of the *du Pont* case, *supra*, Sunkist products are at least as "interchangeable by consumers" with other brands of citrus as cellophane is with other flexible wrappings, (*United States v. du Pont & Co.*, 351 U.S. 377), or as Packard cars are with other makes of automobiles, (*Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418), or as beet sugar is with cane sugar, (*American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387).

C. The Defendant-Respondents Did Not Combine or Conspire to Restrain Trade in Violation of Section 1 of The Sherman Act.

Point II of the petition attacks the District Court's conclusion that "the defendants did not combine or conspire among themselves, or with anyone else, to accomplish anything forbidden by the antitrust laws" (C/L 1). This conclusion, say the petitioners, is predicated on an erroneous rule of law—namely, that a conspiracy in restraint of trade cannot be said to exist if the only "conspirators" are a corporation and its officers and directors acting solely within the scope of their employment (Pet. 20). Nevertheless this rule has not been directly challenged by any decision which we have discovered.[20] Moreover, the petition is most

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[20] Accord: *Mackey* v. *Sears, Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268, 273 (5th Cir. 1954), cert. den. 348 U.S. 821 (1954); *Nelson Radio & Supply Company* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. den. 345 U.S. 925 (1953); *Fleetway, Inc.* v. *Public Service Interstate Transportation Co.*, 72 F.2d 761, 763 (3rd Cir. 1934), cert. den. 293 U.S. 626 (1934); *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 156 F. Supp. 76 (W.D. Penn. 1957); *Herren Candy Co.* v. *Curtiss Candy Co.*, 153 F. Supp. 75 (N.D. Ga. 1957); *Alexander* v. *Texas Co.*, 149 F. Supp. 37 (W.D. La. 1957); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 146 F. Supp. 300, 301 (S.D.N.Y. 1956); *Hershel California Fruit Produce Co., Inc.* v. *Hunt Foods, Inc.*, CCH 1955 Trade Cases, ¶67,928 (N.D. Cal. 1954); *Marion County Cooperation Association* v. *Carnation Company*, 114 F. Supp. 58, 62-63 (W.D. Ark. 1953), aff'd. 214 F.2d 557 (8th Cir. 1954); *Windsor Theatre Co.* v. *Wallbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950); *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447, 449-450 (N.D. Ill. 1947); *Atlanta Brick Co.* v. *O'Neal*, 44 F. Supp. 39, 42 (E.D. Tex. 1942); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 829-830 (D. Md. 1938); *United States* v. *Quaker Oats Company*, 232 Fed. 499, 500 (N.D. Ill. 1916). See also *Times-Picayune* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 183 (1944); McQuade, *Conspiracy, Multi-Corporation Enterprises and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 184 (1955); Searls, *The Antitrust Laws from the Viewpoint of a Private Practitioner*, 1950 Institute on Antitrust Laws and Price-Regulations, 71, 86 (1950).

inaccurate in suggesting that the sole factual basis for invocation of the rule by the District Court, and for its Conclusion of Law No. 1, was its finding that the individual defendant-respondents never took any action in the premises other than as officers and directors of Harris. Quite clearly the Court's conclusion was also based on the following additional findings, among others:

1. There was no evidence that the defendant-respondents ever intended to restrain or monopolize the marketing or sale of produce or that they ever expected to do business other than in competition with other Boston markets (F/F 31-32).

2. The defendant-respondents have not engaged in any predatory business practices, nor have they discriminated as between persons, or classes of persons, similarly situated (F/F 31-32, 34, 38-39).

3. Harris' action in maintaining the five-cent charge was entirely justified by legitimate business reasons and has tended on the whole to stimulate rather than to restrain competition. (F/F 12-13, 18, 20-25, 33, 35-39; see also C/L 2).

In a word, the District Court's Findings of Fact, which have been accepted as amply supported by the evidence, both by the Court of Appeals and by the petitioners themselves, conclusively establish that the defendant-respondents have imposed no unreasonable restraints upon trade or commerce at any distributive level, and that they have not sought to do so. Hence, as pointed out above, the question of what constitutes a "conspiracy" is of peripheral interest only in this case.

D. The Plaintiff-Petitioners Have Not Made a Showing of Injury to Their Business or Property Sufficient to Sustain an Action Under Section 4 of the Clayton Act.

Point III of the petition urges that the District Court's Conclusion of Law No. 5 is contrary to established principles concerning standing to sue under § 4 of the Clayton Act.

It is elementary that in a private action for treble damages under § 4, as in any other action of tort, it is necessary for the plaintiff to prove:

1. That he has been injured;[21]
2. That the injury was proximately caused by the wrongdoing of the defendant,[22] and
3. That a reasonable basis exists, under all the circumstances, for computing the approximate amount of damages thus incurred.[23]

Only when the plaintiff has established these three points does it become necessary to undertake actual computation of damages.

In this case the plaintiff-petitioners made no effort to prove at the trial that the buyers absorbed any part of the five-cent charge (as opposed to passing it along to their customers), and, indeed, the only testimony on the point indicated quite clearly that the records of the plaintiffs

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[21] See, e.g., *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7th Cir. 1943), cert. den. 321 U.S. 792 (1944), and authorities there cited.

[22] See, e.g., *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

[23] See, e.g., *Dipson Theatre* v. *Buffalo Theatres*, 86 F. Supp. 716, 719 (W.D. N.Y. 1949), aff'd. 190 F.2d 951 (2nd Cir. 1951).

were not adequate to establish whether any loss had been incurred as a result of the five-cent charge.[24]

Petitioners claim that since it was admitted that all the plaintiffs paid five-cent charges to Harris, this establishes *ipso facto* that plaintiffs were injured in their business or property by reason of an antitrust law violation. We know of no authority which permits, much less requires, such a view. To be sure, it was not incumbent upon the plaintiffs to adduce evidence at the trial to show the *extent* to which they had been damaged by the five-cent charge.[25] However, it was the view of the District Court that at least some indication of an adverse impact from the five-cent charge upon the business of the plaintiffs should be forthcoming as a part of the plaintiffs' case on liability. Yet, as the District Court found, there was absolutely no evidence that the five-cent charge caused or tended to cause a decrease in the volume of purchases at the auction, a loss in gross or net revenue to the plaintiffs, a decrease in the number of buyers at the auction, or an increase in the prices of citrus or deciduous fruits in the wholesale market in Boston (F/F 35). In fact, the evidence tended to indicate the reverse: i.e., that by instituting[26] and maintaining the five-cent charge the long-term trend of progressive domination of the market by the Boston Market Terminal was halted, supplies of fresh fruit and vegetables coming into the wholesale market in Boston were increased, and competition was enhanced. (F/F 19-21, 36-37, 41; R. 432).

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[24] See F/F 41-42. The evidence tended to show that the plaintiffs have not kept records sufficient to satisfy the standards imposed by §9 of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. Sec. 499i; 46 Stat. 535) and regulations promulgated by the Secretary of Agriculture thereunder. See, e.g., R. 235-239.

[25] This was stipulated by counsel at the commencement of the trial (R. 35-37).

[26] The five-cent charge was first instituted by the vendor of Harris and was simply maintained by defendant-respondents. (F/F 25, 30).

Conclusion

It is respectfully urged that, for the reasons indicated, the writ of certiorari prayed for by the petitioners should be denied.

Respectfully submitted,

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